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May 9, 2005

VIA ELECTRONIC FILING

Tom Navin
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *Michigan Batch Hot Cut Practices*; Unbundled Access to
Network Elements; Review of the Section 251 Unbundling
Obligations of Incumbent Local Exchange Carriers;
WC Docket No. 04-313, CC Docket No. 01-338

Dear Mr. Navin:

I am writing to you on behalf of Talk America, Inc. ("Talk America"), a telecommunications carrier that is attempting to convert several hundred thousand UNE-P lines used to serve residential customers in Michigan to UNE-L arrangements, consistent with the dictates of the Commission's *Triennial Review Remand Order* ("TRRO"). The purpose of this letter is to urge the Commission to pronounce its reliance on RBOC offerings of comprehensive batch hot cut processes and its support of state commission oversight of those processes, as anticipated by both the *Triennial Review Order* ("TRO") and the *TRRO*. During their advocacy in those proceedings, the RBOCs assured the Commission that comprehensive batch cut processes would be available to CLECs;¹ however, that has not readily occurred in all markets. In particular, rather than comply with

¹ See *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* WC Docket No. 04-313, CC Docket No. 01-338; Order on Remand, ¶ 211 (2005) ("TRRO").

Tom Navin
May 9, 2005
Page Two

the batch processing rules adopted by the Michigan PSC ("MPSC"), SBC instead sought judicial review to vacate those rules, claiming that the MPSC had no independent state authority to adopt batch cut processes. Unfortunately, the District Court recently interpreted the Commission's orders and the *USTA II* decision as operating to vacate state rules regarding batch cut processes,² leaving carriers such as Talk America in jeopardy of having unconverted UNE-P circuits at the expiration of the Commission's established 12-month transition period.

Talk America is one of the largest providers of mass market UNE-P services in Michigan and had hoped to convert a minimum of 125,000 customer lines in Michigan to its own switches by June 2005. Despite Talk America's good faith attempts to timely convert those to UNE-L circuits, SBC continues to balk and has little incentive to provide expedient batch cut processing since it may charge higher resale rates for unconverted UNE-P circuits after expiration of the transition period. SBC has agreed to convert roughly 100 circuits per business day, at which rate it will take several years to convert all of Talk America's circuits. Without intervention by the Commission, Talk America and other CLECs will be left at the mercy of SBC and may be forced to pay those higher resale rates, despite their best efforts to convert the circuits. As discussed further below, the Commission must clarify that its directive in the *TRO* for state commissions to review RBOC batch processes was never intended to preempt any state law basis for similar review of those processes, but rather was an independent directive to all state commissions in order to ensure the timely conversion of circuits nationwide.

The Commission's "impairment finding for mass market local circuit switching in the *TRO* was based solely on operational and economic impairment arising from the hot cut process."³ When it reversed this finding in the *TRRO* and concluded that elimination of unbundled local switching would not impair CLECs in the marketplace, the Commission relied heavily on the RBOCs' descriptions of improvements to their batch cut processes that would ensure timely conversion of bulk orders of UNE-P circuits to UNE-L circuits. The Commission found that the new procedures developed by the RBOCs significantly addressed concerns raised in the *TRO* and eliminated any impairment finding based on hot cut processes.⁴

² See *Michigan Bell Tel Co. v. Lark*, Case No. 04-60128 (E.D. Mich. Jan. 6, 2005).

³ *TRRO* ¶ 210.

⁴ *Id.*

Tom Navin
May 9, 2005
Page Three

Specifically, “each of the BOCs has developed a batch hot cut process allowing for a competitive LEC to have multiple customer lines converted to competitive LEC networks within a short time.”⁵ Furthermore, the 12-month transition plan adopted by the Commission was “based on the incumbent LECs’ asserted ability to convert the embedded base of UNE-P customers to UNE-L on a timely basis while continuing to meet hot cut demand for new UNE-L customers.”⁶

However, while fervently advocating to the Commission for elimination of unbundled local switching based on its enhanced batch cut processes, SBC was simultaneously pursuing a litigation strategy to eliminate its legal obligation to provide those processes in Michigan. Immediately after release of the *TRO*, the MPSC had initiated a proceeding to investigate SBC’s batch processes and later adopted an order requiring SBC to provide batch cut processes on an interim basis in accordance with the exact plan SBC developed, without modification.⁷ SBC then filed suit, arguing that *USTA II* vacated the MPSC’s legal authority to review or require batch hot cut processes at all. SBC argued that the MPSC initiated its batch cut review proceeding “exclusively on authority delegated to it by the FCC by the *TRO*” and “that the FCC’s batch cut rules were predicated on, and intrinsically tied to, the FCC’s attempted sub-delegation of authority to state commissions to make market-by-market impairment decisions, which was determined to be unlawful by the D.C. Circuit in *USTA II*.”⁸

As the Commission may be aware, the District Court recently sustained SBC’s plea, finding that the *USTA II* ruling, in vacating the Commission’s delegation of authority to the state commissions to make impairment findings, also vacated the Commission’s directive to state commissions regarding review of RBOC batch cut processes.⁹ The court reasoned that “the MPSC could not establish a batch cut process without first ‘conclud[ing] that the absence of a

⁵ *Id.* ¶ 211.

⁶ *Id.* ¶ 227.

⁷ *In the Matter, On the Commission’s Own Motion, To Investigate and To Implement, If Necessary, a Batch Cut Migration Process*, Case No. U-13891, Order Establishing Batch Cut Migration Process (rel. June 29, 2004) (“MPSC Interim Order”).

⁸ *Id.* at 16-17.

⁹ *Michigan Bell Tel Co. v. Lark*, Case No. 04-60128 (E.D. Mich. Jan. 6, 2005).

Tom Navin
May 9, 2005
Page Four

batch cut migration process is...impairing requesting telecommunications carriers' ability to serve end users' in Michigan."¹⁰ Thus, the court found it impossible to separate the Commission's delegation of impairment determinations to state commissions from its directive for state commissions to investigate the RBOC batch cut processes.¹¹ The court further determined that the MPSC had no state law basis for adopting batch cut procedures and that such requirements were contrary to *USTA II*. Thus, it is important for the Commission to clarify that it did not intend its directive to be the sole basis for state action regarding hot cut processes, nor did it intend to preempt any state law basis for a commission to require RBOC batch cut processes.

While *USTA II* vacated the Commission's delegation to state commissions of decision-making authority pursuant to federal law, it did not vacate the role of state commissions altogether in developing telecommunications policy to implement the Act or similar state law. Undoubtedly, neither Congress nor the Commission intended that federal law would occupy the field in terms of overall regulation of local competition. "If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act."¹² Furthermore, the Commission's detailed discussion of Section 251(d)(3) in Section V.E. of the *TRO* clearly indicates that it never intended to preempt state-law based action that supports Congress' and the Commission's goals and is consistent with federal law.¹³

Moreover, the Commission plainly did not imply a preemption of state review of hot cut processes or intend to predicate state review of those processes on the *TRO* proceeding. Both state commissions and the FCC had been reviewing

¹⁰ *Id.* at 10.

¹¹ *Id.* at 12.

¹² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, ¶ 191-2 (2003) ("*TRO*"), corrected by Errata, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order Errata*"), vacated and remanded in part, affirmed in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") cert. denied, 125 S.Ct. 313, 316, 345 (2004).

¹³ *TRO* ¶ 191-2. See 47 U.S.C. § 251(d)(3).

Tom Navin
May 9, 2005
Page Five

RBOC hot cut processes for many years prior to adoption of the *TRO* and the *USTA II* decision. Most notably, RBOC hot cut processes have been reviewed during the section 271 review process by both the state commissions and the FCC.¹⁴ Thus, there is ample reason for the states to continue to play a vital role in developing batch cut processes:

We find that state regulators are closest to the facts particular to the provisioning issues applicable to their respective markets, and are in the best position to judge whether the incumbent LEC has indeed developed an efficient loop migration process. There can be no doubt that state commissions possess the competence to implement a cost-effective and fast process for provisioning unbundled local loops.¹⁵

Contrary to the court's reasoning regarding the MPSC order,¹⁶ the batch hot cut process is primarily a detail of providing local loops, and the Commission's recognition of the states' unique qualifications in this policy area signifies its strong reliance on their role in reviewing hot cut processes.

Therefore, while state commissions may not adopt, pursuant to state authority, regulations that undermine the federal regime, they may adopt regulations that do not conflict with federal law. In this case, because the RBOCs are easily able to comply with both the Commission's rules and those adopted in the MPSC order, there is no actual conflict between the rules. On the contrary, the MPSC rules support the federal regime and further the goals of the Commission to ensure timely conversion of UNE-P circuits such that impairment to CLECs will not occur. Moreover, in finding no impairment for unbundled local switching, the Commission relied on the same batch hot cut processes proposed by SBC and initially adopted by the MPSC.¹⁷ Thus, the MPSC batch cut

¹⁴ See *TRRO* ¶ 214.

¹⁵ *TRO* ¶ 488.

¹⁶ *Michigan Bell Tel Co.*, Case No. 04-60128, at 12.

¹⁷ Several weeks before the District Court's ruling, the MPSC revised its original order in response to Talk America's request for rehearing, and among other things, increased the size of the batch from 100 to 200 per CLEC per day per central office, with a maximum limit on the volume of hot cuts at any particular end office of 250 circuits, on a first-come, first-served basis. While these batch sizes are

Tom Navin
May 9, 2005
Page Six

requirements do not impede the Commission's goals or rules; rather, they enhance and reinforce those goals.

In this case, the Commission adopted the *TRRO* on the condition that the RBOCs would continue to offer the batch cut processes as promised, stating that "each of the BOCs has adopted batch hot cut processes throughout its territory and has based its advocacy with regard to unbundled mass market local switching on the continued availability of these processes."¹⁸ The Commission must ensure that SBC upholds its commitment to provide comprehensive batch cut processes. Otherwise, parties will scoff at their responsibility to accurately and sincerely convey commitments to the Commission. The Commission must now convey its commitment to local competition by pronouncing its support for continued state oversight of RBOC batch hot cut processes. We urge the Commission to immediately correspond with the Michigan PSC, confirming that it did not intend to preempt independent state law action regarding batch cut processes and supporting reinstatement of the MPSC's Order directing SBC to provide those processes so that the embedded base of UNE-P circuits may be converted within the 12-month transition period established by the Commission.

larger than the amount that SBC proposed and the Commission reviewed in adopting its *TRRO* decision, the MPSC determined that larger batches would be necessary for carriers to convert their UNE-P circuits in a timely manner during the Commission's prescribed transition period. *See In the Matter, On the Commission's Own Motion, To Investigate and To Implement, If Necessary, a Batch Cut Migration Process*, Case No. U-13891, Order, at 7-8 (rel. Dec. 21, 2004) ("MPSC Order on Rehearing").

¹⁸ *TRRO* ¶ 211 n.569.

KELLEY DRYE & WARREN LLP

Tom Navin
May 9, 2005
Page Seven

Sincerely,

/s/

Brad E. Mutschelknaus

Cc: Chairman Martin
Commissioner Abernathy
Commissioner Copps
Commissioner Adelstein
Dan Gonzalez
Michelle Carey
Matt Brill
Jessica Rosenworcel
Scott Bergmann